

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SCOTT ALLAN LITTLE

Claimant

VS.

P & B TRUCKING

Respondent

AND

GREAT WEST CASUALTY CO.

Insurance Carrier

Docket No. 1,021,081

ORDER

Claimant requests review of the April 8, 2005 preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) determined that although claimant suffered accidental injury arising out of and in the course of employment, he failed to give timely notice. The ALJ further determined claimant was aware the work-related incident on July 31, 2004¹ caused his injury but he waited until his employment was terminated to provide notice. The ALJ concluded that waiting to notify respondent until after his termination from employment did not establish just cause for claimant's failure to notify respondent within 10 days of his injury. Consequently, the ALJ denied claimant's request for medical treatment.

The claimant requests review of whether he provided timely notice of his accidental injury. Claimant argues he called respondent's general manager and reported the incident. He further argues that the general manager simply did not recall receiving such notice which does not contradict his testimony. Accordingly, claimant argues he met his burden of proof to establish that he gave timely notice of his injury within 10 days.

¹ The ALJ's decision erroneously notes a specific accident date of July 30, 2003. However, it is clear from the stipulations at preliminary hearing as well as the testimony that the alleged accidental injury occurred on July 31, 2004.

Conversely, respondent argues claimant indicated he would not be in to work as he was seeking treatment for his neck but when asked if his problem was work related he responded that he would process the treatment through his personal health insurance. Moreover, respondent notes claimant provided the treating doctors with a history of no injury or trauma. Approximately 25 days after the alleged accident, the claimant's employment with respondent was terminated and he provided notice of the work-related injury on the following day. Respondent argues the claimant neither provided timely notice nor just cause for his failure to provide notice within 10 days and requests the Board to affirm the ALJ's Order Denying Medical Treatment.

The sole issue raised on appeal is whether claimant gave respondent timely notice of accidental injury as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant had been working for P & B Trucking for about nine months as a truck driver hauling powdered cement. On Saturday, July 31, 2004, claimant was driving from Newton to Fredonia, Kansas, and then to Abilene, Kansas, with a load of powdered cement. His wife accompanied him on this trip. He experienced a sharp burning pain in his neck while driving over some rough spots in the road. Claimant continued his journey and unloaded the cement in Abilene, Kansas, and then continued on to St. Mary's, Kansas, to pick up a load of fly ash and returned to Newton, Kansas, before completing the route the next day.

Claimant testified his neck pain gradually worsened and radiated to his shoulders and arms with numbness into three fingers. On Monday, the pain had increased to such an extent that claimant was unable to get out of bed. His wife called and informed respondent that claimant would not be able to come to work that day. When she explained that his neck was hurting she was asked if the condition was caused by work and she replied that she did not know.

After claimant went to the emergency room seeking treatment, he testified he then called respondent on Tuesday and told respondent's general manager, Kathy, that he had a follow-up medical appointment and he would be unable to work. When asked about the nature of his health problem the claimant replied that his neck was the problem and it happened in the truck.² Claimant testified:

² P.H. Trans. at 12.

Q. (BY MR. OSWALD) Did she ask you to - - did you - - I think in your previous testimony you indicated that you felt you reported some relationship to your injury and the truck?

A. Right. Well, she asked me how I thought it happened, and I said, 'Well, I know it didn't happen at home and it had to have happened in the truck.'³

According to claimant the manager then asked if he was going to file a workers compensation claim. He later indicated she told him that he did not have a workers compensation claim. Finally, he testified he saw respondent's general manager at a town festival sometime in August and told her that his neck condition was work related.

Kathy Carson, respondent's vice president and general manager, recalled talking to claimant on Tuesday and was simply told by claimant that he had awakened with neck pain on Monday morning. No mention was made of an injury occurring in the truck. At that time the claimant told Ms. Carson to schedule him to work the following day. But the following morning the claimant again contacted respondent and indicated he could not work that day. Ms. Carson again contacted claimant that afternoon and was told by claimant that he would work the following day. But once again claimant called in and indicated he could not work. Ms. Carson again contacted claimant and was told that he was going to the doctor and so she did not schedule him until she could be sure he was going to be able to work.

The claimant was told on August 23, 2004, that he was being replaced and that he could reapply when he got to feeling better. Ms. Carson testified that the first time claimant told her he was alleging an injury to his neck from driving the truck was either the August 24th or 25th.

Ms. Carson denied claimant ever told her that he was submitting the medical expense for his neck condition to his health insurance. Nor did she ever tell claimant not to file a workers compensation claim. Ms. Carson further testified that if claimant had indicated that the injury might have occurred driving the truck she would have immediately filled out the paperwork to process the claim. Ms. Carson further denied that claimant related his neck problems to work when they engaged in casual conversation at a town festival.

Claimant was seen by his family physician, Dr. Dwight E. Wheeler on August 5, 2004. Dr. Wheeler prescribed some oral pain medication and an injection. The doctor noted claimant was not aware of any neck injury.⁴ The claimant returned on August 10, 2004, still complaining of neck pain with radiation down the left arm and hand. "Reports

³ *Id.* at 24-25.

⁴ *Id.*, CI Ex. 4.

the pain is worse when he is bouncing in truck but is a pretty much a constant pain he has had for the last eight days.”⁵ Claimant was referred to Dr. Douglas Friesen and on August 30, 2004 noted no history of and injury or trauma.⁶

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

As noted above, there is some conflicting testimony in this case. The claimant and his wife as well as respondent's general manager all testified in person before the ALJ. There is contradictory testimony regarding whether claimant provided timely notice of the work-related injury within 10 days. Thus, credibility is at issue. The ALJ had the opportunity to assess the witnesses' demeanor. In this case, the ALJ did not believe the claimant and specifically determined that respondent was not provided timely notice of claimant's January 31, 2004 accidental injury. Under this circumstance, where conflicting testimony exists, the Board finds some deference should be given to the ALJ's evaluation of the witnesses' credibility. The Board, therefore, taking into consideration the ALJ's opportunity to assess the witnesses' credibility, affirms the ALJ's decision that claimant failed to give timely notice of the January 31, 2004 work-related injury.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

⁵ *Id.* at 2.

⁶ *Id.*, Resp. Ex. A.

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.

(2) Whether the employee is aware he or she has sustained an accident or an injury on the job.

(3) The nature and history of claimant's symptoms.

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

The ALJ further concluded the claimant's testimony was not sufficiently credible to establish just cause for enlargement of the notice period to 75 days. In this instance, claimant's accident was a sudden and traumatic event on July 31, 2004. The incident caused pain which led him to seek emergency room treatment two days later. Initially, claimant failed to provide his doctor a history that he had suffered a specific injury to his neck and instead indicated he had not suffered any injuries. It was only after his employment was terminated that claimant provided notice claiming a work-related injury. The ALJ determined such action does not constitute just cause to extend the notice time to 75 days. The Board agrees and finds claimant has failed to prove that notice was provided in a timely fashion and he further failed to show just cause for the delay in providing notice to respondent of this alleged accidental injury.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁷

WHEREFORE, it is the finding, decision and order of the Board that the Order Denying Medical Treatment of Administrative Law Judge Brad E. Avery dated April 8, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2005.

BOARD MEMBER

⁷ K.S.A. 44-534a(a)(2).

c: Andrew L. Oswald, Attorney for Claimant
 Alexander B. Mitchell, Attorney for Respondent and its Insurance Carrier
 Brad E. Avery, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director